

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

JAMES EARL GEORGE,)	
)	
Plaintiff,)	Civil Action No. 08-189
)	
v.)	Judge McVerry
)	Magistrate Judge Bissoon
RICHARD GIGLIOTTI, <i>et al.</i> ,)	
)	
Defendants.)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

For the reasons that follow, it is respectfully recommended that the Motion for Summary Judgment filed by Defendant DeFazio (Doc. 81) be granted.

II. REPORT

James Earl George (“George” or “Plaintiff”) is a state prisoner currently incarcerated in the Butler County Prison. George alleges in his Amended Complaint that he was denied proper medical care while at the Lawrence County Jail in October, 2007, and then while at the Butler County Prison beginning on November 5, 2007 (Doc. 34, Att. 2). Presently before the Court is a Motion for Summary Judgment filed by Defendant David DeFazio, an attorney, who is alleged to have failed to inform “the court” during a November 20, 2007 hearing about Plaintiff’s medical complaints (*Id.*, at ¶18). Plaintiff offers no further details.

Attorney DeFazio has attached a state court docket sheet to his motion, demonstrating that he was appointed to represent Plaintiff in the Court of Common Pleas of Butler County, Criminal Division, on August 8, 2007. Defendant DeFazio argues that, as court-appointed counsel in a criminal proceeding, he was not acting under color of state law and, accordingly, is

not subject to liability under 42 U.S.C. §1983. Plaintiff's response to the motion was due on or before February 8, 2009, but no response has been filed.

Simply put, counsel, whether court appointed or privately retained, does not act under color of law when representing clients in a legal capacity. See Polk County v. Dodson, 454 U.S. 312, 325 (1981) (holding public defender not acting under color of state law); Steward v. Meeker, 459 F.2d 669 (3d Cir.1972) (privately-retained counsel not acting under color of state law when representing client); Thomas v. Howard, 455 F.2d 228 (3d Cir.1972) (court-appointed pool attorney not acting under color of state law). As such, Attorney DeFazio's motion should be granted.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) & (C) and Local Rule 72.1.4 B, objections to this report and recommendation shall be filed on or before March 23, 2009. Failure to timely file objections may constitute a waiver of any appellate rights.

s/Cathy Bissoon
CATHY BISSOON
UNITED STATES MAGISTRATE JUDGE

Date: March 4, 2009

cc:
JAMES EARL GEORGE
Butler County Prison
121 Vogeley Way
Butler, PA 16001